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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

October Term, 1971
No. .....

JOANNE CARROLL BOWLING, SUSAN ARLENE SETTERS, VIVIAN G. FORTUNO and JOSEPH F. FERRERI,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of Californin, Second Appellate District, Division Two.

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vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two.

Petitioners Joanne Carroll Bowling, Susan Arlene Setters, Vivian G. Fortuno and Joseph R. Ferreri, pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, reversing judgments of the Appellate Department of the Superior Court which in turn reversed the Municipal Court which convicted petitioners of violation of California Penal Code §647(a) (soliciting or engaging in lewd or dissolute conduct in a place open to the public) for which petitioners Bowling and Fortuno were sentenced to serve five hundred forty days in jail and fined $1,875.00, and petitioners Ferreri and Setters were sentenced to five hundred days in jail.

Proceedings Below.

The judgments of conviction were made upon a jury verdict by Judge Irwin J. Nebron of the Municipal Court of Los Angeles Judicial District, State of California, without opinion. Said judgments of conviction were reversed by the Appellate Department of the Superior Court of the State of California in a written opinion, following which the matter was certified by the Appellate Department to the Court of Appeal of the State of California, which affirmed the judgments of conviction by a written opinion on March 7, 1972. Appendix A. Following a denial of a Petition for Rehearing by the Court of Appeal, the Supreme Court of the State of California denied a Petition for Hearing and directed that the written opinion of the Court of Appeal not be published in the official Appellate Reports. Appendix B.

Jurisdiction.

The date of the judgment sought to be reviewed is March 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented.

1. Can the District Court of Appeal reverse the Court below it without having the transcript of the evidence before it when the issue involved is a "constitutionally protected dance"?

2. Where the only information concerning the facts below is referred to in the briefs of counsel, may an

Appellate Court reverse the decision below if the activity involves First Amendment Constitutional Rights?

3. Where the activity involves a "27 minute dance" may an Appellate Court reverse the Court below because they find three or four minutes thereof unacceptable as described in the City Attorney's brief?

Constitutional and Statutory Provisions Involved.

This case involves the First Amendment (and to the extent the rights protected by the First Amendment apply to the States, the Fourteenth Amendment) to the United States Constitution, California Penal Code §§311(g) and 647(a), and Rule 64, California Rules of Court.

First Amendment:

> "Congress shall make no law—abridging the freedom of speech, . . ."

Fourteenth Amendment:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. . . ."

California Penal Code §311(g):

> " 'Obscene live conduct' means any physical human body activity whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomining, where, taken as a whole,

the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance."

Penal Code §647(a):

"647 DISORDERLY CONDUCT

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

"(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Rule 64. Record:

"(a) [Contents]

"(1) [WHERE THERE WAS NO TRIAL IN SUPERIOR COURT] In any case in which there was no trial in the superior court the record or transfer shall consist of the original record, briefs, all original papers, pleadings, documents, and exhibits on file in the case, any orders made by the superior court, and a copy of any opinion of the superior court."

Statement of the Case.

Petitioners (defendants below), Bowling and Fortuno, were sentenced to serve five hundred forty days in jail and fined $1,875.00, and petitioners (defendants be-

low) Ferreri and Setters, were sentenced to serve five hundred days in jail for a series of violations of California Penal Code §647(a) in that it was adjudged that petitioners Bowling and Fortuno had solicited, and petitioners Ferreri and Setters had engaged in lewd and dissolute conduct, in a place open to the public, to wit: had performed a theatrical performance or "Love Dance" on a raised stage of a tavern or beer bar located in the City of Los Angeles [Rep. Tr. pp. 9, 11-12, 17-22, 57, 61, 66, 68, 105, 107-108, 110, 121, 152, 153-156, 162-163, 168-172, 179 214-218, 223, 241-242, 412-419]. Said raised stage performances followed a prepared script in that all movements of the dancers were choreographed by an experienced choreographer, there was extensive rehearsal before presentation, the performance was re-enacted without much variation, production techniques such as lighting and stage position were considered an integral part of the performance, the performance of the "LOVE DANCE" and the progressive thematic segments thereof, were intended to and did portray the dominant theme of courtship and culmination of a love affair as conceived by the choreographer, all body movements of the dancers as well as facial expressions and musical accompaniment were intentionally staged to coincide and be consistent therewith, and the performers pantomined singing to each other, as they executed their progressive series of choreographed segments.

REASONS FOR GRANTING THE WRIT.

A. The Judgment Below Violates Petitioners' Rights Under the First and Fourteenth Amendments to the United States Constitution in That the Reviewing Court Did Not Have or Read the Evidence of This Case Involving the Constitutional Issue of Free Speech.

The First Amendment extends its mantle of protection to a "dance" (a series of "rhythmical movements of any and all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas," 7 Encyclopaedia Brittanica, 1945, 13-14). This Court has held that the First Amendment does extend to "theatrical performances" and that such are not limited to formal and professional productions in a theatre. *Schacht v. United States,* 398 U.S. 58 (1970).

The First Amendment indeed protects the "dance" as well as the "theatrical performance" and that such lose their protection and may become the basis of a criminal conviction only upon the proof of their obscenity as that term has been defined in *Roth v. United States,* 354 U.S. 476 (1957) and in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). *Roth v. United States, infra,* has correctly determined that the terms "lewd" and "dissolute" in California Penal Code §647(a) are identical in their meaning to the term "obscene" and that the same standards annunciated by this Court as to obscenity with regard to printed material and motion pictures are applicable to the dance and to theatrical performances.

Accordingly, since the criminal convictions of Petitioners herein were based upon their presentation of

and involvement in a "dance" or what amounted to a "theatrical performance" in that said performance embodied all the necessary and relevant elements of a dramatic presentation by portraying human emotion and ideas by means of rhythmic body movements rather than by dialogue, it was constitutionally incumbent upon the reviewing Court in this matter to make an independent examination and determination of the *entire* record of this case involving the constitutional issue of free speech in order to ensure that First Amendment Rights have not been suppressed. Such a constitutional duty was recognized by the California Supreme Court in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 (1963), and by this Court in *Roth v. United States, supra*, and in *Jacobellis v. State of Ohio*, 378 U.S. 184, 188, 190 (1964):

> "Since it is only 'obscenity" that is excluded from the constitutional protection the question whether a particular work is obscene necessarily implicates an issue of constitutional law . . . such an issue, we think, must ultimately be decided by this court."

Further, as Mr. Justice Harlan stated in *Roth v. United States, supra*, at 497-498:

> ". . . a reviewing court must determine for *itself* whether the attached expression is suppressible within constitutional standards . . ."

As was submitted by petitioners herein in their Petition for Hearing to the California Supreme Court, in this matter, at pages 3 and 4 of that Petition, the Court of Appeal of the State of California, Second Appellate District, completely disregarded and declined to follow both *Rule 64, California Rules of Court* (re-

quiring the presence of the entire record before the Court of Appeal), *stare decisis* and the basic teachings of this Court in *Roth v. United States, supra,* and in *Jacobellis v. Ohio, supra;* and of the California Supreme Court in *Zeitlin v. Arnebergh, supra.* For the Court of Appeal rendered its decision in the instant matter without having before it, nor considering, in any manner whatsoever, the six volume Reporter's Transcript of a five and a half week trial, as well as the numerous exhibits in the instant case (including a film of the performance in question, made contemporaneously with the jury's view of said performance), all of which remained in the files of the Appellate Department of the Superior Court, for the County of Los Angeles, and which were never requested by nor transferred to the Court of Appeal at any time.

Petitioners respectfully submit that without such before it, the Court of Appeal could not and did not make an independent examination of the entire record and could not and did not determine for itself whether petitioners' expression was constitutionally suppressible.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Joanne Carroll Bowling, et al., Defendants and Appellants. March 7, 1972, 2d Crim. No. 21296.

APPEALS from judgments of the Municipal Court for the Los Angeles Judicial District of Los Angeles County. Affirmed.

Harrison W. Hertzberg, Esq., for Appellants.

Roger Arnebergh, City Attorney, by Ward G. McConnell, Deputy City Attorney, for Respondent.

This is an appeal on transfer from the Appellate Department of the Superior Court of Los Angeles County under Rule 62(a). The appellate department certified the matter on its own motion pursuant to Rule 63(a).

Appellants were convicted in a jury trial of violations of Penal Code section 647(a).

The single question presented is whether the conviction can stand in light of the decision of our Supreme Court in *Barrows v. Municipal Court*, 1 Cal. 3d 821.

The essential facts are not in dispute.

On approximately 5 separate occasions during the months of September, October and November, 1970, police officers of the City of Los Angeles visited the "Bottoms Up" Bar. On each occasion they observed what was described by a hawker at the door as a "live sex show." The bar charged $5.00 for admission.

The "show" consisted of appellants Ferreri (a man) and Setters (a woman) while on a raised stage, disrobing each other, caressing each other's body, and then, while lying on the stage, engaging in an act of sexual intercourse. While this activity, which lasted about 25 minutes overall, was going on, background music was provided by appellant Bowling who played several selections from a Juke Box.

Thus, to borrow a line from a popular song of the recent past, in this case it seems "they've gone about as far as they can go" in testing the limits of legally protected conduct.

Appellants' claim to First Amendment protection and thus *Barrows'* protection for their "theatrical performance" is premised on the fact that prior to engaging in the act of sexual intercourse they went through a series of moves and gestures which they euphemistically refer to as a "dance". Reduced to its barest (no pun intended) essentials, this so-called "dance" was nothing more than erotic movements leading up to and culminating in the act of intercourse.

The fact that two persons would engage in the spectacle of actually performing sexual intercourse on a stage in a bar in the presence of curious onlookers who paid $5.00 for the privilege of watching would be hard to believe but for the frank admission of the appellants.

It cannot be seriously argued but that this was lewd conduct in a public place and thus within the definition of the precise language of section 647(a) of the Penal Code.

Our inquiry cannot end here for the reason that in *Barrows* our Supreme Court discerned an underlying

legislative intent to exempt "theatrical performances" from the ambit of section 647(a).

In *Barrows* the court was confronted with the prosecution of the director, producer and actors in a play performed in a theater, which play involved at one point, a simulated sex act. The court's basic premise there was that a play is a form of expression which enjoys First Amendment protection similar to other forms of communication media.

The court in *Barrows,* at page 826, concluded that ". . . first, the basic purpose of section 647 is to punish the crime of vagrancy in its various *overt* aspects; second, nothing in the legislative history of the section indicates that it was intended to apply to activities, such as theatrical performances, which are prima facie within the ambit of First Amendment protection." (Emphasis added.)

Theatrical is defined by Webster's Seventh New Collegiate Dictionary as "(1) of or relating to the theatre or the presentation of plays, (2) marked by pretense or artificiality of emotion."

Performance is defined as "(3) the action of representing a character in a play."

An act of intercourse even though performed on a stage and preceded by preliminary erotic caressing, however artfully done, does not appear to us to possess any of the indicia of a "theatrical performance."

In the case of *People v. Natividad,* 2d Crim. No. 20043, an unpublished opinion of the Court of Appeal, Second Appellate District, filed October 27, 1971, this court dealt with a conviction of two defendants for violating section 647(a) on the basis that they had participated in a simulated act of sexual intercourse

and oral copulation. There, as here, the acts were performed on a stage in a bar in front of patrons who had paid an admission fee. Mr. Justice Allport, writing for a unanimous court, stated: "While some might argue that the conduct involved amounted to a 'dance' under the definition of such in *In re Giannini, supra,* 69 Cal.2d at 568, this court prefers to categorize it as an exhibition calculated to arouse latent sexual desires and release the inhibitions of the viewers rather than a 'mode of expressing emotion and dramatic feeling' by the performer. In our opinion the conduct of defendant is not embodied in the concepts of the freedoms of speech or communication of ideas envisioned by the framers of the Constitution, nor can it, by being dignified as either a dance or theatrical performance, be extended the protection afforded by the First Amendment under a doctrine of liberal construction. On the contrary, we conclude that the 'performance' of this defendant was activity intended to be condemned by the Legislature in enacting Penal Code section 647 and related statutes and utterly without redeeming social importance."

In the landmark decision of *Roth v. United States,* 354 U.S. 476, at page 512, Mr. Justice Douglas, a most ardent and articulate advocate of giving broad sweep to the First Amendment, stated ". . . there is nothing in the Constitution which forbids Congress from using its power . . . to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

This theme is repeated in *Barrows* where the court at page 830, says "Our holding here does not suggest that acts which are independently prohibited by law

may be consummated without sanction on the stage merely because they occur during the course of a theatrical play. . . . *Giannini* [*In re Giannini*, 69 Cal. 2d 563] makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, *losing that protection only if found to be obscene*.'" (Emphasis added.) (Also see *In re Panchot*, 70 Cal. 2d 105; *People v. Noroff*, 67 Cal. 2d 791, where the court found sexual activity to be the critical factor in determining whether photographs were obscene.)

For the purposes of section 647(a), "obscene" and "lewd" are synonymous. (*Giannini, supra.*)

In sum, the *Barrows* majority was concerned with the expression of ideas and found that the Legislature did not intend to make section 647(a) applicable in that area.

We feel confident that the *Barrows* majority did not foresee, nor did it intend, that its language would be seized upon to shield from prosecution the blatantly lewd exhibition which occurred in the "Bottoms Up" Bar. Nor do we find any such intent on the part of the Legislature.

In *Barrows* the court found support for its assessment of the legislative intent underlying section 647(a) in the provisions of section 290 of the Penal Code which requires registration of persons convicted of section 647(a) but not of those persons convicted of violating the obscenity laws.

Under the circumstances of the case now engaging our attention we are persuaded by the logic of Mr.

Justice Burke in his dissent in *Barrows* to the effect that the application of section 290 to these appellants is a matter for another forum and another day and should not serve as a reason for exempting their conduct from the clear prohibition of section 647(a).

In view of our holding it is unnecessary to discuss in detail the court's instructions to the jury which appellants contend were in error.

The questioned instructions[1] were addressed to the subject of a "theatrical performance" and were more favorable to appellants than required by the law. Thus appellants cannot claim prejudicial error.

The judgments are affirmed.

CERTIFIED FOR PUBLICATION.

Compton, *J.*

We concur:

Herndon, *Acting P. J.*

Fleming, *J.*

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[1]"If you find that the activities of the defendants herein were in fact a live theatrical performance, no part of which may be separated or removed without destroying the dominant theme, and if you find that the theatrical performance was not obscene, as that term is used in these instructions, you must find the defendants not guilty.

"However, if you find that the activities of the defendant herein were in fact a live theatrical performance, no part of which may be separated or removed without destroying the dominant theme, and further, if you find that the theatrical performance was obscene, as that term is used in these instructions, then you must find the defendants guilty."

APPENDIX B.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 2, Crim. No. 21296.

In the Supreme Court of the State of California, in Bank.

People v. Bowling (and 13 other consolidated cases).

Filed: May 4, 1972.

Appellants' petition for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeals, filed March 7, 1972 and appearing in 23 Cal. App. 3rd 1021, for the reason it cites an unpublished opinion. (Cal. Const., Art., VI, Section 14; Rule 976, Cal. Rules of Court.)

McComb, J., and Peters, J., do not concur in the order for non-publication.

/s/ Wright
Chief Justice